

1 MICHAEL BAILEY  
2 United States Attorney  
3 District of Arizona

4 KEVIN M. RAPP (Arizona Bar No. 014249)  
5 Email: Kevin.Rapp@usdoj.gov  
6 COLEEN P. SCHOCHE (Georgia Bar No. 366545)  
7 Email: Coleen.Schoch@usdoj.gov  
8 Assistant U.S. Attorneys  
Two Renaissance Square  
40 N. Central Ave., Suite 1800  
Phoenix, Arizona 85004  
Telephone: 602-514-7500  
*Attorneys for Plaintiff*

9  
10 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

11 United States of America,  
12 Plaintiff,  
13 v.  
14 David Allen Harbour,  
15 Defendant.

16 No. CR-19-00898-PHX-DLR(DMF)

17  
18 **RESPONSE IN OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
FORFEITURE COUNT AS IT  
RELATES TO ALLEGED  
INVESTOR-VICTIMS "R.G.," "A.W.,"  
"D.W.," "C.H.," AND "P.H." AND TO  
DISMISS COUNTS 11 AND 12 [Doc. 199]**

19  
20 **SUMMARY OF ARGUMENT**

21 Defendant David Allen Harbour's ("Defendant") sequel motion seeking a  
22 dismissal of the forfeiture allegation fares no better than the original. R.G. and victims  
23 included in the Superseding Indictment ("SSI") (A.W., D.W., P.H., and C.H.) were  
24 among the investors defrauded by Defendant based on a series of misrepresentations  
25 and omissions of material facts. Second, the money judgment in the forfeiture  
26 allegation can include funds that were traceable to Defendant's fraud that are outside  
27 the five-year statute of limitations applicable to substantive counts. Lastly, in  
28 furtherance of the fraudulent scheme, Defendant committed both wire and mail fraud  
involving some of the investors. Therefore, the SSI properly alleges the mail fraud  
counts that furthered the scheme. This motion should be denied.

1       **I. Legal Standard**

2                  The Court is well-versed in the legal standard governing Defendant's request to  
3 dismiss the SSI's forfeiture allegation. As noted by the Court in its most recent Order, a  
4 defendant may move to dismiss an indictment for failure to state an offense. (Doc. 137);  
5 Fed.R. Crim P. 12(b)(3)(B)(v). In determining, however, whether to grant a motion to  
6 dismiss, the Court is required to "accept the truth of the allegations in the indictment in  
7 analyzing whether a cognizable offense has been charged." *United States v. Boren*, 278  
8 F.3d 911, 914 (9th Cir. 2002) (citation omitted). When addressing "a pre-trial motion to  
9 dismiss an indictment for failure to state an offense, the district court is bound by the four  
10 corners of the indictment." *Id.* "A motion to dismiss the indictment cannot be used as a  
11 device for a summary trial of the evidence." *United States v. Jensen*, 93 F.3d 667, 669 (9th  
12 Cir. 1995) (quoting *United States v. Marra*, 481 F.2d 1196, 1199 (6th Cir. 1973)). And,  
13 the Court can consider a motion to dismiss only where it involves questions of law rather  
14 than fact. *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986).

15       **II. Argument**

16                  Defendant engaged in an investment fraud scheme that had similar hallmarks:  
17 (1) he would invest the victims' money in an unspecified and vague investment; (2)  
18 he promised high rate of returns and/or efforts to prevent creditors or the government  
19 from attaching their funds; (3) he provided victims with modest interest payments  
20 (sometimes in the form of *Ponzi* payments) or none at all; and (4) their principal  
21 investment was never returned. For example, the government detailed how Defendant  
22 separated R.G. from her husband's life insurance proceeds in 2010. (*See* Doc. 154)  
23 In addition to the victims in the July 2019 Indictment, additional victims have been  
24 added to the SSI that include C.H., P.H., A.W., and D.W. Defendant argues that none of  
25 these new victims have substantive counts connected to the scheme, and therefore, any  
26 forfeiture allegations based on money they lost due to Defendant's fraud should be time  
27 barred because they are outside the five-year statute of limitations. (Mot. at 6)

1           First, it is unclear how this motion differs from the previous motion to dismiss.  
2 The court found there, that, based on applicable law, a motion to dismiss based on  
3 this theory is inappropriate. (Doc. 132 ) The court found it is well-established that an  
4 indictment “need not identify the property subject to forfeiture or specify the amount of  
5 any forfeiture money judgment that the government seeks.” Fed. R. Crim. P. 32.2(a).  
6 Rather, the Indictment is a mere notice document. *See* Fed. R. Crim. P. 32.2 advisory  
7 committee’s note (“As courts have held, subdivision (a) is not intended to require that an  
8 itemized list of the property to be forfeited appear in the indictment.”). “If an indictment  
9 is not required to name specific property for later forfeiture, it would be manifestly  
10 illogical to require its allegations to specify the factual nexus between the unlawful  
11 conduct and the as-yet-unspecified property.” *U.S. v. Palfrey*, 499 F.Supp.2d 34, 48-49  
12 (D.D.C. 2007). Indeed, the Court found that the government need not establish a factual  
13 nexus between R.G.’s transaction and the charged conduct in the indictment at this  
14 juncture. Similarly, the government, pretrial, need not establish a nexus between the  
15 transactions involving D.W., A.W., C.H., and P.H. and the forfeiture allegation. Rather,  
16 at trial, the government must establish a factual nexus between the forfeiture money  
17 judgment and the charged illegal activity. *Id.* at 48; *United States v. DeFries*, 129 F.3d  
18 1293 (D.C. Cir. 1997) (at trial, to prevail in securing a forfeiture order, the government  
19 must establish a causal link between the violation and the property); *United States v.*  
20 *Dote*, 150 F.Supp.2d 935, 943 (N.D. Ill. 2001) (the amount of money subject to forfeiture  
21 is a matter for the government to prove at trial and a question of fact, not a matter the  
22 Court can resolve on a motion to dismiss); *U.S. v. Chan*, No. CR. 96-350 WBS, 2006 WL  
23 224389, at \*2 (E.D. Cal. Jan. 27, 2006) (a defendant may not use Fed. R. Crim. P. 12(b)  
24 to challenge a forfeiture allegation based on evidence not appearing on the face of the  
25 indictment).

26           In addition, Defendant's argument that the money judgment is defective because  
27 some of the funds were acquired outside the five-year statute of limitations is unavailing.  
28 It is a well-settled point of law that the government may seek the forfeiture of *all* proceeds

1 involved in a scheme or conspiracy. *See* 18 U.S.C. § 981(a)(1)(C) (providing that “[a]ny  
 2 property, real or personal, which constitutes or is derived from proceeds traceable” to mail  
 3 fraud, wire fraud or a conspiracy to commit mail and wire fraud is subject to forfeiture);  
 4 *United States v. Venturella*, 585 F.3d 1013, 1015, 1016–17 (7th Cir.2009) (holding that  
 5 the defendants must forfeit the total proceeds of the scheme to defraud); *United States v.*  
 6 *Capoccia*, 503 F.3d 103, 117–18 (2d Cir.2007) (“Where the conviction itself is for  
 7 executing a scheme, engaging in a conspiracy, or conducting a racketeering enterprise,  
 8 the government need only establish that the forfeited assets have the ‘requisite nexus,’  
 9 Fed.R.Crim.P. 32.2(b)(1), to that scheme, conspiracy, or enterprise.”); *see also United*  
 10 *States v. Emor*, 850 F.Supp.2d 176, 217 (D.D.C.2012) (“When a defendant has engaged  
 11 in a mail or wire fraud scheme, forfeiture is not limited to the proceeds gained through the  
 12 particular mailing or wire transaction on which the conviction was based; rather, it  
 13 ‘extends to the entire scheme’ of which the mailing or wire transaction was a part.”  
 14 (quoting *Venturella*, 585 F.3d at 1015)). Defendant has cited no authority, binding or  
 15 persuasive, which leads to a different conclusion. Thus, the Court should also reject  
 16 Defendant's motion to dismiss based on being barred by the statute of limitations.

### 17      III. Mail Fraud Counts are Properly Alleged

18      Defendant's motion to dismiss the mail fraud counts is also unavailing and should  
 19 be denied. Defendant argues that “the government does not allege, nor can it, that the  
 20 payments were in furtherance of an alleged mail fraud scheme that concluded almost two  
 21 years prior, or how these payments comprised part of any scheme.” (Mot. at 7) Defendant  
 22 misstates and/or misunderstands the fraudulent scheme alleged in the SSI.

23      In determining whether either a mail or wire scheme exists, a defendant's words  
 24 and statements as well as the circumstances in which they are used as a whole may be  
 25 considered. *See United States v. Woods*, 335 F.3d at 997-1000 (9<sup>th</sup> Cir. 2003). The overall  
 26 success of a mail or wire fraud scheme is immaterial. *United States v. Rude*, 88 F.3d 1538,  
 27 1547 (9th Cir. 1996); *United States v. Utz*, 886 F.2d 1148, 1150-51 (9th Cir. 1989). It also  
 28 does not matter whether the material mailed or transmitted electronically was itself false

1 or deceptive so long as the mails or wires were used as a part of the scheme, and a mailing  
 2 or wire transmission is caused when one knows that the wires will be used in the ordinary  
 3 course of business or when one can reasonably foresee such use. *See United States v.*  
 4 *Serang*, 156 F.3d 910, 914-15 (9th Cir. 1998); *U.S. v. Hubbard*, 96 F.3d 1223, 1231-32  
 5 (9th Cir. 1996). Each individual mailing in furtherance of a prohibited scheme to defraud  
 6 constitutes a separate mail-fraud violation. *United States v. Poliak*, 823 F.2d 371, 372 (9th  
 7 Cir. 1987).

8       Defendant promised high rates of return on A.W. and C.H.'s investment.  
 9 Defendant, however, misrepresented material information to both A.W. (Count 11) and  
 10 C.H. (Count 12) to convince them to invest \$100,000 and \$87,000, respectively.<sup>1</sup> A.W.  
 11 received a couple interest payments, by mail, from Defendant to her account at Liberty  
 12 Trust located in Dallas, TX. Likewise, C.H. received a paltry \$255 payment from  
 13 Defendant (by mail) to her account at Liberty Trust for the purpose of keeping the account  
 14 open with the promise that additional payments would be forthcoming. Again, neither  
 15 A.W. nor C.H. were informed of the exorbitant 25% finder's fee that was paid to Defendant  
 16 upon receipt of their funds, they received only minimal interest payments or none at all,  
 17 and no return on their principal. When C.H. demanded the return of funds, Defendant  
 18 blamed J.T./KSQ. Similarly, when A.W. asked for her funds to be returned, Defendant  
 19 initially told her that the funds were pooled and then later claimed they had been transferred  
 20 to another venture. A.W. incorrectly believed her funds were protected by the promissory  
 21 notes Defendant executed along with promises by Defendant that she would be paid. None  
 22 of this was true.

23       Therefore, the mailings detailed in Counts 11 and 12 are within the five-year statute  
 24 of limitations and in furtherance of Defendant's scheme to defraud. This motion should  
 25 be denied.

---

26  
 27       <sup>1</sup> C.H.'s husband, P.H., also invested \$500,000 with defendant and neither received  
 28 an interest payment nor a return of principle.

1                   Respectfully submitted this 17th day of February, 2021.

2                   MICHAEL BAILEY  
3                   United States Attorney  
4                   District of Arizona

5                   s/Kevin Rapp  
6                   KEVIN M. RAPP  
7                   Assistant U.S. Attorney

8                   **CERTIFICATE OF SERVICE**

9                   I hereby certify that on this 17th day of February, 2021, I electronically transmitted  
10                  the attached document to the Clerk's Office using the CM/ECF System for filing and a copy  
11                  transmitted to the following CM/ECF registrant:

12                  Alan Baskin, Esq.  
13                  *Attorney for Defendant*

14                    
15                  s/Joy Faraj  
16                  U.S. Attorney's Office